Filed 4/26/19 In re Q.M. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Q.M., a Person Coming Under the Juvenile Court Law.	H045254 (Santa Clara County Super. Ct. No. 317JV42381)
THE PEOPLE, Plaintiff and Respondent, v. Q.M., Defendant and Appellant.	

After 17-year-old Q. admitted allegations that he committed attempted murder (Pen. Code, §§ 187, 664), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and first-degree residential burglary with the intent to commit a felony (Pen. Code, §§ 459, 460, subd. (a)), the juvenile court declared him a ward of the court pursuant to Welfare and Institutions Code[1] section 602 and committed him to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) for a maximum term of 15 years 4 months.

On appeal, Q. contends that the juvenile court abused its discretion by committing him to the DJJ rather than placing him in a less restrictive setting. He also argues that, pursuant to Penal Code section 654, the juvenile court should have ordered a maximum

[1] All further unspecified statutory references are to the Welfare and Institutions Code.

term of confinement of 12 years. The Attorney General concedes that Penal Code section 654 applies to this case.

We find that the juvenile court did not abuse its discretion in committing Q. to the DJJ. However, we agree with Q. and the Attorney General that the juvenile court should have stayed the term of commitment for assault with a deadly weapon and residential burglary. Therefore, we modify the judgment to reflect that Q.'s maximum period of commitment is 12 years.

I. STATEMENT OF THE FACTS AND CASE[2]

On April 27, 2017, Q. was at school when he realized that his former girlfriend, L. was not there. Q. found L.'s location by using the "Find My Friends" application on his phone. Q. had been drinking alcohol that morning and was intoxicated. Q. borrowed his friend's car and left school to find L.

L. was with her boyfriend J. at his house. The two were asleep in J.'s bed. When Q. arrived at the house, he entered through a sliding patio door and saw L. in bed with J. Q. began hyperventilating, and went outside into the backyard. He picked up several rocks and chose one to bring back into the house. Q. returned to the bedroom holding the rock and repeatedly struck J.'s head and face with the rock five to 10 times.

Q. left the house in the car and drove to the mall where he cleaned the blood from his face, put on new clothes and shoes that he had stolen from stores. He also removed and discarded the SIM card from his cell phone. Police officers eventually arrested Q. in Campbell.

As a result of the assault, J. suffered a fractured skull and an epidural hematoma. He also had cuts to his scalp that required 20 stiches and two staples to close. J.'s jaw was damaged, one tooth was chipped, and two teeth were cracked. He remained in intensive care for two days. He developed night terrors, dropped out of college, and

[2] The facts are derived from the dispositional report.

commenced psychiatric counseling. He was diagnosed with "traumatic brain injury" and Post Traumatic Stress Disorder (PTSD).

On May 1, 2017, a juvenile wardship petition was filed by the Santa Clara County District Attorney against Q., who at the time was 17 years old. (§ 602.) The petition alleged that Q. committed attempted murder (Pen. Code, §§ 187, 664; count 1), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 2), and first-degree residential burglary with the intent to commit a felony (Pen. Code, §§ 459, 460, subd. (a); count 3). As to counts 1 and 2, the petition alleged that Q. inflicted great bodily injury on the victim within the meaning of Penal Code, section 12022.7, subdivision (a) and section 1203, subdivision (e)(3).

On May 2, 2017, Q. admitted all of the counts and allegations in the petition and was adjudged a ward of the juvenile court.

On May 23, 2017, Dr. Robert Perez submitted a Cognitive/Psychodiagnostic Assessment that he conducted with Q. in the juvenile hall. He opined that Q. suffers from major depressive disorder, ADHD (inattentive type), adjustment disorder, moderate alcohol use disorder, and moderate cannabis use disorder. Perez expressed concern over Q.'s alcohol use, and the fact that Q. had consumed a large amount of alcohol the morning he committed the crimes in this case. Perez stated that he would "endorse release to parental custody" if certain conditions were met, such as psychopharmacological treatment and stabilization of Q.'s depression, individual therapy for Q., as well as family therapy, and participation in an outpatient substance abuse treatment program.

On June 13, 2017, the juvenile court continued the dispositional hearing pending receipt of a supplemental report from the probation department.[3]

[3] There was no jurisdictional hearing in this case.

In the June 30, 2017 supplemental dispositional report, Perla Arellano, the probation officer assigned to Q. at the time of his arrest, recommended that Q. be committed to the DJJ. Arellano believed that probation would not be appropriate for Q. based in part on the opinion of Perez, that he was "uncomfortable releasing [Q.] to [his] parents," until Q.'s psychiatric situation and medications became stabilized, and his depression had abated. Arellano did not believe that Q. should be returned to the community, because J. and his family, as well as L. and her family, remained traumatized by Q.'s crimes. Arellano stated that because of Q.'s crimes, he was ineligible for certain programs such as EDGE (Encouraging Diversity, Growth and Education), PEAK (Providing, Education, Alternative, and Knowledge), and PATH2S (Progress Achieved Through Hope & Holistic Services).

Arellano considered placement for Q. to address his depression and alcohol-use disorder. However, Rebekah Children's Services in Gilroy would not admit Q. because of concern that Q. might leave the program and harm the victim again, Uplift Family Services in Los Gatos would not admit Q. because of safety concerns based on Q.'s crimes, and Clarinda and Woodward Academies, both in Iowa, would not admit Q. because his violent behaviors and the serious and vicious nature of his crimes. In addition, Q. was too old for Rebekah Children's Services, Clarinda Academy, and Cinnamon Hills.

Arellano also considered placement of Q. in a short-term program that would be from three to six months. In addition to the fact that Q. was rejected by six short-term programs, Arellano concluded that such programs would be inappropriate for Q. because they would not adequately hold him accountable for his crimes.

The next type of placement Arellano considered was a six to eight-month detention facility affiliated with the Juvenile Rehabilitation Facility (JRF), such as the William F. James Ranch programs, Starlight Community Services, and Pathway Society. However, Arellano concluded that Q.'s "mental health and substance abuse needs may be

higher than what JRF can provide." Arellano stated, "the severity of [Q.'s] crime requires a long-term commitment beyond six to eight months in a highly structured and secure environment."

Based on Q.'s background, and the violent nature of his crimes, Arellano concluded that the best placement for him would be a commitment to the DJJ. The report stated that Q. "is in serious need of a highly structured, long-term treatment program for the purpose of accountability coupled with rehabilitation, as well as to maintain community safety and to repair the harm to the victim by his criminal behavior."

Following receipt of the supplemental report, Q. requested a contested dispositional hearing that was held on September 20, 2017. The prosecution presented the testimony of Parole Agent Lorraine Custino, who testified about the DJJ programs, and Probation Officer Arellano, who provided background and other information supporting her opinion that Q. should be placed in the DJJ. Q.'s counsel presented the testimony of Bradley Landfair, who offered the court information about George Junior Republic (GJR), a licensed residential program in Pennsylvania that could be an alternative placement for Q.

Custino testified that she is the DJJ court community liaison, and had worked for the DJJ for 14 years. Custino's role at the DJJ is to screen cases to determine if a minor is an appropriate candidate for the program. Custino stated that a minor with a mental health diagnosis such as depression, ADHD or substance abuse would not be excluded from the DJJ. Custino testified that within the first 24 hours of a minor's intake at the DJJ, he would be examined by both a psychologist and a doctor. During the first 45 days of living at the DJJ, the minor would meet the senior youth correctional counselor to review the program and its expectations. During the intake process, the minor would also meet with a case work specialist who is a trained as a social worker and peace officer, to be interviewed and to have his file and family history reviewed. The case work specialist

would also review the strengths of the minor at entry to the DJJ and the risk of possible re-offense upon release.

During intake, the DJJ staff assess specific programs that would be helpful to address the minor's issues. One of the programs that is available to minors with substance abuse problems is a 38-week cognitive behavioral therapy substance abuse group that provides positive methods to prevent recidivism. The DJJ also offers a 10-week aggression interruption training program to address a minor's anger management issues. Custino said that the education programs at the DJJ include college-level correspondence courses and on-site classes, and career technical education such as construction, landscaping, culinary, and forklift certification.

Once the DJJ's intake procedure is complete, the minor would be transferred to a living unit. "High core" units are for those minors with a high risk to reoffend, while "low core" units are for the remainder. All of the living units have on-site counselors and case workers. A minor would be reassessed every 120 days while at the DJJ to determine if he should be reassigned to another unit.

Custino testified that each minor at the DJJ is assigned a youth correctional counselor who works with three other minors. Minors can ask to speak with a counselor at any time, can request an immediate meeting with a therapist or casework specialist to address a problem. If a minor has a diagnosis of ADHD, depression, or substance abuse issues he would not necessarily be placed in the mental health unit of the DJJ.

Custino testified that parents are encouraged to visit their child on weekends, and the DJJ hosts quarterly family nights, during which the parents have an opportunity to talk to the minor's counselors. Furloughs are not permitted because the DJJ is a secure environment.

Custino testified that based on Q.'s crimes, his parole board date for release from the DJJ would be four years. However, if Q. participates in programs that earn him extra time credits, he could be released sooner. A minor can earn up to 15 days of credit each

month for participating in programs. If a minor reoffends after release, he can be returned to the DJJ for a maximum of one year.

Following Custino's testimony, Arellano testified that she believed that the DJJ was the best placement for Q. based in part on her evaluation of the severity of the crimes, and Q.'s mental health needs. Specifically, Arellano noted the severity of Q.'s crimes "suggest[ed] that a somewhat restrictive treatment plan is needed and is pending stabilization of this situation." She believed that Q. should be committed to the DJJ because it would offer a balance "between rehabilitation and accountability."

Arellano stated that according to the Juvenile Assessment and Intervention System (JAIS) evaluation score, Q.'s risk of reoffending is low. The score showed that Q.'s violent crime demonstrated a sudden onset of delinquent behavior, a significant decline in school attendance and achievement, emotional instability, and a marked shift in peer attachment from prosocial to problematic.

Arellano testified that she was very concerned about Q.'s behavior both before and after his crimes. Specifically, she noted that Q. was so focused on finding L. that he entered a stranger's home without permission. Arellano was also concerned that after finding L., Q. did not leave; rather, he went outside, found a rock, and re-entered the house to attack J.

Arellano testified about the different placement options that might address Q.'s needs. Arellano did not believe that home supervision with electronic monitoring could be appropriate for Q. based on the seriousness of his crimes, and need for community safety. She noted that Q. had been screened by Rebekah Children Services, Uplift, Family Services, Casa Pacifica, Cinnamon Hills, Clorenza Academy, and Woodward Academy, all of which had rejected him.

Arellano reviewed information about GJR, and spoke to the admissions coordinator, Bradley Landfair, who offered information about the programs offered there Arellano did not believe that GJR was appropriate for Q., because it was not a locked and

secure facility, it offered only a nine to 12-month program, and youth can obtain off-site furloughs within three months. Arellano also did not believe that a one-year placement at GJR was sufficient to address Q.'s rehabilitative needs or to hold him accountable for his crimes. Arellano noted that GJR does not provide for supervised parole after release.

In addition to hearing the testimony of Custino and Arellano, the court considered photographs of J. in the hospital that showed his injuries from Q.'s crimes. J.'s mother asked that the court commit Q. to the DJJ. She said that J. suffered a "traumatic brain injury," and that her family was in fear of Q. J. and his doctor submitted letters to the court detailing J.'s ongoing mental health problems and PTSD as a result of the attack.

Q.'s counsel presented the testimony of Bradley Landfair to support the argument that GJR is a preferable placement to the DJJ. Landfair stated that GJR is located in western Pennsylvania near the Ohio border. GJR is a residential placement facility for minors between the ages of 8 and 19 years old. About 40 percent of the minors have committed crimes and about 25 percent are truants or require foster care.

Landfair testified that a minor would be assessed at intake to determine the level of care he would need and would be given a medical and psychological evaluation. GJR has an onsite school, vocational and recreational programs, and treatment programs. There also is a vocational school across the street from GJR where minors can take classes. In addition to educational opportunities, GJR offers a residential drug and alcohol care program.

Landfair testified that GJR's program typically lasts six months. The minors are not physically restrained at GJR; rather, the facility uses a "passive . . . restraint" technique of surrounding the youth. GJR allows a minor's parents to visit two weekends per month and minors are permitted "off-grounds visitation . . . after 30-days of placement." Landfair said that GJR's enrollment at the time of the hearing included one minor that had been charged with attempted murder.

Landfair testified that he had accepted Q. to GJR. Q. would be placed in the highest level of care that GJR provides, which entails more staff supervision and structure and is more restrictive. Q. would receive a minimum of two hours of individual therapy each week. Landfair said that the goal would be for Q. to remain in the special-needs unit for two months and then step down to the group-home level of care for the remainder of his nine to 12 months at GJR. The group homes are staffed by married couples and are like foster homes. The minors are permitted to walk to school, recreation, vocational programs, and medical appointments.

At the conclusion of evidence, Q.'s counsel argued that Q. should be placed in GJR rather than the DJJ, because the DJJ would not offer the type of mental health services that Q. needed. Counsel argued that the DJJ would not provide individual counseling for Q.'s substance abuse issues, whereas GJR would provide more intensive therapy. Counsel argued nine months at GJR would provide Q. with more hours of counseling than four years at the DJJ.

The prosecutor requested that Q. be committed to the DJJ for Q.'s rehabilitation and the protection and safety of the public. He argued that the serious and violent nature of the crime, as well as Q.'s behavior after the crimes demonstrated that he was an extreme danger to the community. He noted that GJR was not appropriate for Q., because it was not a secure facility, and Q. needed the DJJ's long-term treatment and secure environment.

At the conclusion of the hearing, the juvenile court said that it was going to consider several issues before deciding on the appropriate placement, stating, "the law is quite clear that the Court must start with the least restrictive environment possible that will also accomplish the main aims of protecting society and helping the minor. [¶] . . . [T]he first option is home with supervision, then programs with supervision, then living arrangements with programs with supervision, and ultimately [the] DJJ. [¶] The appropriate resolution of a case of this magnitude would be either a program such as

George Junior or [the] DJJ." The court noted that there were differences between the DJJ and GJR, such as the fact that a minor committed to the DJJ would stay for approximately 2.3 years, and at GJR, he would stay for only about a year. The court also noted that the DJJ facility is secure and has a wired perimeter, whereas GJR is not. The court continued the matter in order to compare the treatment options offered at both facilities before finally determining Q.'s placement.

On October 23, 2017, the court committed Q. to the DJJ for the maximum term of confinement of 15 years 4 months. The court stated that it considered a number of things in determining that the DJJ was the better placement for Q. The court noted that "there is an opportunity at George Junior to walk away, the mixture of the people there is significantly different, and the fact that a certain number of kids just simply go away. But also this crime was so serious that I think it requires something longer than the 9 to 12 months which George Junior would be advocating."

Q. filed a timely notice of appeal on November 6, 2017.

II. DISCUSSION

Q. asserts that the juvenile court erred in committing him to the DJJ, because there is not substantial evidence that the DJJ would rehabilitate him and protect the welfare and safety of the community. He also argues that the juvenile court should have stayed execution of the term of commitment imposed for assault with a deadly weapon and residential burglary pursuant to Penal Code section 654. We agree with Q. regarding Penal Code section 654; however, we find that the trial court did not abuse its discretion in committing him to the DJJ.

A. Commitment to the DJJ

We review the juvenile court's order committing Q. to the DJJ "for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision." (*In re Angela J.* (2003) 111 Cal.App.4th 1392, 1396.) In doing so, we are mindful of the twofold purposes of the juvenile delinquency laws: "(1) to serve the 'best interests' of

the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public.' " (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615.)

The DJJ is normally a placement of last resort. Section 734 provides that "[n]o ward of the juvenile court shall be committed to the [DJJ] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ]." (§ 734.) However, "there is no absolute rule that a DJJ commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate." (*In re J.S.* (2009) 174 Cal.App.4th 1241, 1250.)

In determining the appropriate disposition for a minor, the juvenile court is required to consider "(1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history." (§ 725.5.) "Additionally, 'there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.' [Citation.] [Citation.]" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 484-485.)

Considered together, all of the factors stated above support the trial court's decision to commit Q. to the DJJ. Q. was 18 years old at the time of the dispositional hearing in September 2017, and could not be placed in certain ranch programs because his age rendered him ineligible. Several other programs would not receive him because of the violence of his offenses. The offenses were committed by entering a stranger's home without invitation after Q. located his former girlfriend with a tracking application

on his smartphone. The attack was premeditated, as Q. left the house and returned with a rock to assault J. The violence was perpetrated while Q. was in close proximity to both J. and L. and they were in bed, particularly vulnerable to attack. After the assault, Q. fled the scene, but had sufficient sophistication to change the clothes he had been wearing that would have connected him to the crime. While Q. did not have any delinquent history, this incident required intervention and rehabilitation based on his "abrupt onset of delinquent behavior"—delinquent behavior of a most dangerous type that had no precedent in the minor's previous conduct.

In addition, the evidence shows that there is a probable benefit to Q. from placement in the DJJ. Arellano testified that the DJJ would provide Q. with programs to address his aggression and anger issues, his substance abuse, and to help him improve his social skills for better peer interactions. The DJJ offers a highly structured long-term program which would "hold [Q.] accountable and provide him with essential rehabilitative services." Although GJR is a less restrictive placement than the DJJ, it would not sufficiently address the needs of the community for safety or Q.'s need for rehabilitation. The court expressed great concern with the fact that GJR was not a secure facility, and the program offered was too short to address Q.'s rehabilitative needs.

Q. argues that the juvenile court should have placed him in GJR because unlike the DJJ, GJR would provide intensive therapy for his mental health concerns as well as substance abuse programs for his alcohol abuse. Q. asserts that there was not sufficient evidence that a less restrictive placement such as GJR would be inappropriate or ineffective. Q. emphasizes the fact that GJR provides superior mental health services to the DJJ such as individual therapy to address Q.'s depression. In addition, unlike the DJJ, GJR offers specialized educational classes to address Q.'s ADHD.

In support of his argument, Q. cites *In re Calvin S.* (2016) 5 Cal.App.5th 522, wherein the juvenile court declared the minor a ward of the court and committed him to the DJJ. (*Id.* at p. 525.) The minor had an IQ of 58 and was receiving services for his

developmental disability that could continue if he remained in juvenile hall, but not if he was placed in the DJJ. (*Id.* at pp. 526-527.) The juvenile court committed the minor to the DJJ stating: "juvenile hall is 'not a treatment center,' but 'a detention center.' " (*Id.* at p. 532.) The Court of Appeal reversed, finding there was no evidence that juvenile hall, which is a less restrictive alternative to the DJJ, would be an ineffective or inappropriate placement for the minor. (*Id.* at p. 532.)

We do not find *Calvin S.* supportive of Q.'s argument. In contrast to the circumstances in *Calvin S.*, this record contains substantial evidence that placing appellant in a less restrictive alternative would have been inappropriate. Serious concerns existed about the short length of time that Q. could be placed at GJR as opposed to the DJJ. There was substantial evidence presented that Q. needed a long-term program for both his mental health and his substance abuse that could not be provided by an eight-month to one-year stay at GJR. In addition, there was substantial evidence that Q. needed to be placed in a secure facility, and GJR did not meet this requirement. Contrary to Q.'s argument, there was substantial evidence of the "inappropriateness or ineffectiveness of less restrictive alternatives.' [Citation.] [Citation.]" (*In re Jonathan T., supra*, 166 Cal.App.4th at pp. 484-485.)

Based on this record, the juvenile court was satisfied that it was probable Q. would benefit "by the reformatory educational discipline or other treatment provided by the [DJJ]." (§ 734.) Substantial evidence demonstrates both a probable benefit to Q. by this commitment and the inappropriateness of less restrictive alternatives. (See *In re Angela J., supra,* 111 Cal.App.4th at p. 1396.) Because substantial evidence supports the juvenile court's commitment order, we find no abuse of discretion.

B. Penal Code Section 654

Q. argues that his term of confinement for assault in count 2 and burglary in count 3 should have been stayed pursuant to Penal Code section 654, and that his maximum term of confinement should be 12 years.

In a juvenile case, the maximum term of confinement is defined as "the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (§ 726, subd. (d)(1).) "Section 726 permits the juvenile court to aggregate terms on the basis of previously sustained section 602 petitions in computing the maximum period of confinement. [Citation.] 'Thus, section 726 authorizes the court in a section 602 proceeding to "aggregate the period of physical confinement on multiple counts, or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602. . . ." ' [Citation.] [¶] Aggregation is not mandatory or automatic, but rests within the sound discretion of the juvenile court. [Citation.]" (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.)

Penal Code section 654, subdivision (a) provides, in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 is intended "to insure that a defendant's punishment [is] commensurate with his [or her] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statute bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Conversely, where a defendant commits multiple criminal offenses during a single course of conduct, he or she may be separately punished for each offense that he or she committed pursuant to a separate intent and objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

The Attorney General concedes that Penal Code section 654 applies to this case, and as a result, the maximum period of confinement should be modified to 12 years, consisting of nine years for attempted murder, with the addition of three years for the

weapon enhancement. The evidence supports the conclusion that Q. acted with the same intent when he entered J.'s house, saw L. there, went outside to get a rock and returned to assault J. with the rock. Q.'s actions during the assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and first-degree residential burglary with the intent to commit a felony (Pen. Code, §§ 459, 460, subd. (a)) were part of the same course of conduct and criminal objective as the attempted murder (Pen. Code, §§ 187, 664), and cannot be punished separately under Penal Code section 654.

III. DISPOSITION

The judgment is modified to reflect that the maximum term of confinement in the DJJ is 12 years. As modified, the judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

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Bamattre-Manoukian, J.

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Danner, J.

People v. Q.M.
No. H045254